

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS A. CASTRO-ISAQUIRRE,

Defendant-Appellant.

---

UNPUBLISHED

April 6, 2004

No. 242134

Mason Circuit Court

LC No. 01-016948-FC

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age). The trial court sentenced defendant to 10 to 25 years' imprisonment. We affirm.

Defendant first argues on appeal that there was insufficient evidence at trial to support a finding that defendant penetrated the victim, which is an essential element of CSC I. We disagree.

In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 260 Mich App 201, 207; \_\_ NW2d \_\_ (2003). The statutory definition of "sexual penetration" includes any intrusion, "however slight," of any part of a person's body into the genital opening of another person's body. MCL 750.520a(o).

In the present case, the victim's description of defendant's acts, although uncertain and inconsistent, established that she thought that defendant had penetrated her vagina with his penis. The victim testified that defendant's acts caused her pain. The doctor who examined the victim testified that pain is consistent with penetration. The medical coordinator/child care assistant who interviewed the victim and assisted the doctor in examining the victim testified that the victim had told her that defendant had put "his [penis] inside of her [vagina]." When viewing the testimony in the light most favorable to the prosecution, there was sufficient evidence for a reasonable jury to find that the prosecution proved the necessary element of penetration beyond a reasonable doubt.

Defendant next contends that this Court should either reverse defendant's conviction or remand his case to the trial court for an in camera hearing to determine the admissibility of evidence that the victim was sexually assaulted by someone before the sexual assault by defendant took place. For this proposition, defendant relies on *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998). However, defendant does not explain why the requisite offer of proof was not made before the trial court despite having been granted that opportunity by the trial court. Absent a sufficient demonstration during an offer of proof that the proffered evidence is relevant, the motion to admit the evidence must be denied. *Id.* at 437. Defendant provides us with no reason to reverse and remand his case on this point, and we decline to do so.

Next, defendant argues that he was denied a fair trial because the trial court permitted the prosecution to present evidence of defendant's other bad acts pursuant to MRE 404(b) even though the prosecution failed to provide the requisite notice. Defendant did not raise this argument before the trial court, and thus it is not properly preserved. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Griffin*, 235 Mich App 27, 44, 597 NW2d 176 (1999). We review unpreserved claims for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Apparently defendant does not contest the admissibility of the evidence absent the lack of notice, but would leave this determination to the trial court were this Court to remand his case for a new trial. First, we note that the trial court implicitly found that the prosecutor had good reason for not providing notice under MRE 404(b), and defendant fails to demonstrate error. Second, defendant's argument on appeal alleges that the lack of notice deprived him of his opportunity to adequately voir dire the jury. However, the trial court gave an appropriate jury instruction to limit the use of the evidence of defendant's other bad acts; the jury is presumed to have followed the instructions that they were given. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant has not demonstrated outcome determinative plain error. *Carines, supra*.

Defendant also argues that prosecutorial misconduct denied him a fair trial. Specifically, defendant contends that the prosecutor's comments during closing arguments that there was no evidence introduced that was contrary to the people's evidence were improper because this focused the jury on defendant's decision not to testify. Defendant failed to object to these comments at trial, and has failed to preserve this issue for appeal. *Carter, supra* at 214. Reversal on the basis of unpreserved claims of prosecutorial misconduct is only warranted when the misconduct results in plain error causing the conviction of an actually innocent defendant, or when the plain error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Carines, supra*; *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). After reviewing the prosecutor's comments in context, we find that the prosecutor's statements were not reasonably calculated to focus the jury on defendant's decision not to testify on his own behalf, and no error occurred. *People v Guenther*, 188 Mich App 174, 176-179; 469 NW2d 59 (1991). Instead, they were properly responsive to matters raised by defendant, and thus reversal is not required. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Finally, defendant contends that he is entitled to resentencing. Defendant initially argues that the trial court improperly scored offense variables (OV) 10, MCL 777.40 (exploitation of a vulnerable victim) and 11, MCL 777.41 (sexual penetration). We disagree. Having reviewed the evidence at trial and the trial court's reasoning with respect to whether defendant engaged in

predatory conduct with regard to exploitation of the victim and engaged in multiple penetrations, we conclude that the trial court did not clearly err in these scoring decisions and in scoring OVs 10 and 11 accordingly. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003) (scoring decisions will be upheld if there is any evidence in support of them).

Defendant also contends that the trial court abused its discretion in sentencing him to a minimum sentence of 120 months, in excess of the sentencing guidelines range of 51 to 85 months dictated by the scoring of his sentencing information report. We review the trial court's articulated reasons for exceeding the guidelines to determine if they were substantial and compelling, and the reason articulated must not have been taken into account in calculating the guidelines range. *People v Babcock*, 469 Mich 247, 271-274; 666 NW2d 231 (2003). Here, the trial court based its departure on the fact that defendant, who has a sexually transmitted disease, exposed the victim, her mother, and her sister to the disease. Defendant was apparently the live-in boyfriend of the victim's mother and there was evidence that defendant also had sexually assaulted the victim's sister. The trial court noted the communicable nature of the disease and the consequences of such a disease on a young victim. These circumstances are substantial and compelling and were not considered in scoring the guidelines. Therefore, we cannot say that the trial court abused its discretion when it exceeded the sentencing guidelines in this case.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot